

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICKY A. BERBERICH
Claimant

VS.

U.S.D. #609/SEKESC
Respondent

AND

**KANSAS ASSOCIATION OF SCHOOL
BOARDS RISK MGMT. SERVICES**
Insurance Carrier

Docket No. 1,003,648

ORDER

Respondent and its insurance carrier requested review of the August 7, 2003 Award by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on February 10, 2004.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that the claimant sustained a 13 percent permanent partial disability to the body as a whole based on Dr. Paul S. Stein's 11 percent rating to the right upper extremity which converts to a 7 percent to the body as a whole combined with Dr. Edward J. Prostic's 6 percent body as a whole rating for her neck injury and impairment.

The respondent requests review of the nature and extent of claimant's disability. Respondent argues the claimant did not sustain any permanent impairment to her neck, as evidenced by the testimony of Dr. Stein, the independent medical examiner, and therefore argues the award should be limited to an 11 percent scheduled injury to the shoulder.

Claimant contends she suffered injury and resulting impairment not just in her shoulder but in the neck as well, thus entitling her to the whole body impairment. Claimant argues she is entitled to at least the 13 percent awarded by the ALJ. In the alternative, claimant suggests the 17 percent to the body as a whole assessed by Dr. Prostin is more appropriate under these facts and circumstances.

The sole issue raised by the parties for the Board's determination in this appeal was the nature and extent of claimant's disability. At oral argument, however, the parties acknowledged that there was an additional evidentiary issue to address with respect to certain medical records offered by claimant during Dr. James K. Cole's deposition. Respondent had objected to the introduction of these documents alleging a lack of foundation and that they contained hearsay.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured on March 15, 2001 when an autistic child she was working with grabbed her by her right arm. She was provided with treatment and progressed through a series of physicians including Dr. F. Ronald Seglie, Dr. John M. Veitch and ultimately Dr. James K. Cole.

Dr. Cole is an orthopaedic physician who specializes in surgery to the spine. He first saw claimant on June 8, 2001. Based upon her complaints of pain in the base of the neck, numbness in her fingers and hands and severe radiating pain in the distal ulnar aspect in her right arm, Dr. Cole diagnosed a painful right shoulder.¹ During this visit claimant denied any specific neck pain. He recommended physical therapy and scheduled to see her again on August 14, 2001.

During that visit, claimant complained of pain and numbness in her right arm from her neck down to her fingertips. Claimant also complained of "right leg pain that starts in

¹ Cole Depo., Ex. 1 at 2.

the right buttocks, goes down the lateral leg, across the knee, and into the medial ankle and heel region.”² She did not tell Dr. Cole that she had previously experienced tingling in her hands and some neck problems for which she had received chiropractic treatment before her work related accident. Because her complaints sounded radicular in nature, Dr. Cole had a second MRI done. This MRI showed degenerative changes in claimant’s neck which he could not relate to her physical complaints.³ He also ruled out any radiculopathy, based upon the EMG results and this second MRI.⁴ Dr. Cole then referred claimant to Dr. Robert K. Lieurance, another physician within his office, for further treatment to her shoulder as he did not believe her symptoms were attributable to the neck.⁵

When deposed, Dr. Cole was asked whether the degenerative disk disease in claimant’s neck was aggravated by claimant’s March 15, 2001 altercation with a student. He opined that based on her original presentation, he felt that her preexisting degenerative disease was “probably aggravated by the active restraint of this unruly student.”⁶ He further opined that as long as she continues to complain of neck pain, it is indicative of an aggravation of her underlying degenerative condition.⁷

Dr. Cole was asked had he known that claimant had experienced both neck problems and tingling in her arms before the accident would this alter his opinions, he conceded that it is difficult to know “with any reasonable degree of certainty” whether her condition had changed in any way.⁸ Nonetheless, he maintained that claimant’s work related injury aggravated her underlying degenerative disk disease.⁹

At her counsel’s request, claimant was evaluated by Dr. Edward J. Prostic, M.D., a local orthopaedic physician, who routinely performs medical/legal examinations. Dr. Prostic saw claimant on May 24, 2002 and at that time, her complaints were pain in the right side of her neck and in her right shoulder. She also complained of intermittent numbness in her right hand and a weakness of grip. Claimant disclosed her prior neck

² *Id.*, Ex. 1 at 3.

³ *Id.* at 8.

⁴ *Id.*, Ex. 1 at 2.

⁵ *Id.* at 13, Ex. 1 at 4.

⁶ *Id.* at 8.

⁷ *Id.* at 9-10.

⁸ *Id.* at 19-20.

⁹ *Id.* at 20.

problems and her treatment with a chiropractor identified only as “Pappas” but according to Dr. Prostic, claimant lost no time from work and was able to perform all her expected activities.¹⁰

Dr. Prostic’s examination identified a limited loss of range of motion in her neck and shoulder as well as mild crepitus in the shoulder. He also found symptoms of carpal tunnel on the right. Dr. Prostic concluded her physical examination supported complaints of cervical disk disease, frozen shoulder syndrome and carpal tunnel syndrome.¹¹ He further concluded these conditions were either caused by or permanently aggravated by her work related injury.¹² He assigned a 6 percent to the body as a whole for her cervical complaints along with a 20 percent to the right upper extremity at the shoulder. When combined under the method set forth in the *Guides*,¹³ this yields a 17 percent to the body as a whole.¹⁴

When asked to explain his methodology in coming to the 6 percent to the neck, Dr. Prostic replied that he utilized the range of motion method contained in Table 75 of the *Guides* rather than the DRE categories also found in the *Guides*. According to Dr. Prostic, claimant has an injury superimposed upon a preexisting disease process which compels an evaluator to utilize Table 75 rather than the DRE categories.¹⁵ He explained that a single traumatic injury is to be rated under the DRE categories but for repetitive or cumulative injuries, the range of motion model is more properly used.¹⁶

The ALJ elected to order an independent medical examination pursuant to K.S.A. 44-510e(a) and directed Dr. Paul S. Stein to examine claimant and opine as to her permanent impairment attributable to her work related injury. Dr. Stein saw claimant on September 18, 2002. For whatever reason, he was not given the chiropractor’s records nor was Dr. Prostic’s final report shared with Dr. Stein. In fact, it appears that neither party’s counsel ever obtained the medical records from Dr. Pappas, the chiropractor.

According to Dr. Stein, claimant’s chief complaints were to her right trapezius up in to the right side of her neck along with pain in her right shoulder. Claimant did not disclose

¹⁰ Prostic Depo., Ex. 2 at 1.

¹¹ *Id.* at 12.

¹² *Id.* at 13-14.

¹³ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

¹⁴ Prostic Depo. at 15; unless otherwise indicated, all references are to the 4th ed. of the *Guides*.

¹⁵ *Id.* at 16-17.

¹⁶ *Id.* at 17.

her prior chiropractic treatment to her neck nor her tingling complaints in her hands, although, Dr. Stein testified that he routinely attempts to illicit such information during his examinations. Dr. Stein did not have Dr. Prostic's written report which disclosed this prior history.

Dr. Stein examined claimant and found a mild to moderate decrease in her range of cervical movement with no muscle spasms or tenderness in the neck.¹⁷ Dr. Stein did not find any indication of cervical radiculopathy.¹⁸ Claimant also demonstrated a decreased range of motion in her right shoulder. Based upon this examination, Dr. Stein concluded claimant's problems were in her shoulder and not her neck. He further testified that he "didn't feel there was any primary pathology in the neck" and that "the discomfort that she had in her neck was radiating pain from the shoulder and the trapezius injury."¹⁹ Dr. Stein assigned an 11 percent impairment to the right upper extremity at the shoulder level.²⁰

During cross examination by claimant's counsel, Dr. Stein was asked to calculate claimant's permanency for her neck complaints, setting aside the issue of causation. After consulting the *Guides*, he assigned an 11 percent to the body as a whole based upon Table 75, range of motion.²¹ This 11 percent did not take into consideration her age, preexisting condition, her complaints or any other factors. When combined, these two ratings yield a 17 percent impairment body as a whole.

When presented with this evidence, the ultimate decision turned upon whether claimant's permanent impairment was to a scheduled body member, specifically the shoulder, or to the body as a whole. While the ALJ concluded the opinions of Dr. Stein should be given greater weight and accepted his 11 percent to the shoulder, the ALJ further found that claimant sustained an injury to the neck. However, he did not adopt the opinions of Dr. Stein and instead adopted Dr. Prostic's opinion that the claimant bears a 6 percent to the body as a whole for her loss of motion in the cervical region. When combined, this yields a 13 percent to the body as a whole.

After considering the record as a whole, the Board finds the Award should be modified.

¹⁷ Stein Depo. at 9.

¹⁸ Id. at 10.

¹⁹ Id. at 10.

²⁰ Id. at 11.

²¹ Id. at 20-21.

From the outset of this claim, the dispute between the parties centered upon the nature and extent of her injury, specifically whether her accident resulted in an injury just to her shoulder or to her neck as well. There is no dispute between the parties that claimant sustained an injury to her upper extremity. Dr. Stein, the independent medical examiner, assessed 11 percent to the shoulder. The ALJ adopted Dr. Stein's impairment rating with respect to the shoulder and the Board finds no reason to set this portion of the Award aside.

In addition to her shoulder, claimant has had a significant amount of evaluation and conservative treatment to her neck. Moreover, she continues to experience ongoing complaints of pain at the base of her skull as well as a limited range of motion. This is evidenced by the medical records contained within the record.²² Dr. Prostic testified that claimant's accident aggravated her preexisting disk disease. Dr. Cole concluded the same.²³ Even Dr. Stein, who observed a mild to moderate decrease in claimant's cervical movement as well as tenderness, assigned an 11 percent for her limited range of motion. However, Dr. Stein remained steadfast in his belief that claimant's primary pathology is in her shoulder and not in her neck.

Although respondent's counsel attempted to attribute claimant's neck complaints to a preexisting neck condition, which she apparently failed to disclose to both Dr. Cole and Dr. Stein, there is little evidence within the record to justify such an argument. The record does not contain the chiropractic records of Dr. Pappas nor did he testify. In fact, neither party ever obtained those records in spite of the disclosure in Dr. Prostic's March 24, 2002 report. Claimant testified that she did seek chiropractic treatment 2 to 3 times per year for the 4 to 5 years prior to her accident. She further testified that after these chiropractic adjustments she would be pain free. Claimant also testified that she had no neck symptoms just prior to her accident and that her present neck pain complaints are in a different area and far more constant and aggravating.²⁴ There is no evidence that claimant had an ongoing, symptomatic degenerative condition that, as of the day before her work-related injury in March 2001, could have been rated under the *Guides*.

²² Respondent's evidentiary objection to claimant's medical records from Midwest, the orthopaedic practice where Drs. Veitch and Cole practice, is overruled. Dr. Cole authenticated these records during his deposition and although the Board finds that any opinions contained within these records are inadmissible under K.S.A. 44-519, the records are nonetheless admissible for the purpose of documenting claimant's physical complaints and the treatment provided. *Boeing Military Airplane Co. V. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988).

²³ Cole Depo. at 9-10.

²⁴ R.H. Trans. at 26.

Based on this uncontroverted evidence, the Board concurs with the ALJ's conclusion that claimant sustained an injury to her shoulder with a resulting disability which includes the neck. While Dr. Prostic assigned a 6 percent to the body as a whole for the limited range of motion, the Board finds Dr. Stein's assessment of 11 percent to the body is more appropriate and indicative of her complaints and limitations. That figure, when combined with his 11 percent shoulder rating yields a total impairment of 17 percent body as a whole.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated August 7, 2003, be modified as follows:

The claimant is entitled to 70.55 weeks of permanent partial disability compensation at the rate of \$185.25 per week or \$13,069.39 for an 17% to the body as a whole, making a total award of \$13,069.39, which is due, owing and ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula Greathouse, Workers Compensation Director